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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

8 JAIRO BRAVO PEDROZA, No. C-12-1341 EMC (pr)  
9 Plaintiff,

10 v. **ORDER OF DISMISSAL WITH LEAVE**  
11 San Jose Police Officer PHAM, # 3759;  
12 *et al.*, **TO AMEND**  
Defendants.

## I. INTRODUCTION

16 Jairo Bravo Pedroza, a California housed at the T.C.C.F. in Tutwiler, Mississippi, filed this  
17 *pro se* civil rights action under 42 U.S.C. § 1983. His complaint is now before the Court for review  
18 under 28 U.S.C. § 1915A.

## II. BACKGROUND

20 In his complaint, Pedroza alleges that he was arrested on August 17, 2007, and booked into  
21 the jail by San Jose police officer Pham. "During the booking procedure Officer Pham seized blood  
22 from [Pedroza's] arm without [his] consent." Complaint, p. 3. Pedroza alleges that the taking of  
23 blood over his objection violated his rights under the Fourth, Fifth, Eighth and Fourteenth  
24 Amendments to the U.S. Constitution.

### III. DISCUSSION

26 A federal court must engage in a preliminary screening of any case in which a prisoner seeks  
27 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.

1       § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims  
2 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
3 monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b). *Pro se*  
4 pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
5 (9th Cir. 1990).

6           To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right  
7 secured by the Constitution or laws of the United States was violated and (2) that the violation was  
8 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48  
9 (1988).

10          The non-consensual extraction of blood implicates the Fourth Amendment's protection  
11 against unreasonable searches and seizures. *See Skinner v. Railway Labor Executives' Ass'n*, 489  
12 U.S. 602, 616 (1989); *Schmerber v. California*, 384 U.S. 757, 766-72 (1966). Giving the *pro se*  
13 complaint the liberal construction to which it is entitled, the allegations of a non-consensual blood  
14 draw are sufficient to state a § 1983 claim against officer Pham for a Fourth Amendment violation.

15          The complaint does not state a claim against officer Pham for a violation of any of the other  
16 constitutional provisions listed therein. The Fifth Amendment privilege against self-incrimination  
17 does not prohibit the state from drawing blood from a defendant or using the results from the blood  
18 draw against him. *See Schmerber*, 384 U.S. at 761. The Eighth Amendment prohibition of cruel  
19 and unusual punishment does not apply before the person has been convicted. *See Bell v. Wolfish*,  
20 441 U.S. 520, 535 n.16 (1979). Extracting blood from an arrestee also may amount to a due process  
21 violation if done in an unreasonable manner. *See Schmerber*, 384 U.S. at 771-72; *see generally Rochin v. California*, 342 U.S. 165, 172 (1952). However, it cannot be determined from  
22 the complaint that a due process claim has been pled because Pedroza has not alleged the use of any  
23 force, and his allegations are unclear whether the blood was drawn by a police officer or drawn by  
24 medical personnel at the direction of the officer. In his amended complaint, he may attempt to  
25 allege facts showing a due process violation.

26          There are no allegations in the complaint against the other three listed defendants, *i.e.*, the  
27 City of San Jose, the San Jose Police Department, or Santa Clara County. There is no respondeat

1 superior liability under § 1983, *i.e.* no liability just because an entity employs a person who has  
 2 violated his rights. *See Board of County Comm'r's v. Brown*, 520 U.S. 397, 403 (1997); *Monell v.*  
 3 *Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). However, local governments are “persons” subject  
 4 to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *See*  
 5 *Monell*, 436 U.S. at 690. To impose municipal liability under § 1983 for a violation of constitutional  
 6 rights, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she  
 7 was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate  
 8 indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving force behind  
 9 the constitutional violation. *See Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438  
 10 (9th Cir. 1997). In his amended complaint, Pedroza may attempt to allege a claim against any or all  
 11 of the municipal Defendants. If no claim is alleged, the municipal Defendants will be dismissed.

12 **IV. CONCLUSION**

13 The complaint states a cognizable § 1983 claim against officer Pham for a Fourth  
 14 Amendment violation. Leave to amend will be granted so that Pedroza may attempt to cure the  
 15 pleading deficiencies discussed in this order in an amended complaint. The amended complaint  
 16 must be filed no later than **July 13, 2012**, and must include the caption and civil case number used in  
 17 this order and the words AMENDED COMPLAINT on the first page. Pedroza is cautioned that his  
 18 amended complaint must be a complete statement of his claims and will supersede existing  
 19 pleadings. *See London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) (“a plaintiff  
 20 waives all causes of action alleged in the original complaint which are not alleged in the amended  
 21 complaint.”) Therefore, he must repeat his allegations against officer Pham in the amended  
 22 complaint if he files an amended complaint. Failure to file the amended complaint by the deadline  
 23 will result in the dismissal of all claims except the Fourth Amendment claim against officer Pham.

24 **IT IS SO ORDERED.**

25 Dated: June 18, 2012

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 28 EDWARD M. CHEN  
United States District Judge